PCLL Conversion Examination
June 2016
Examiner's Comments
Criminal Procedure

Part A

Question 1.1

This was a question which focussed on the police power to make an arrest, conferred by s50(1) PFO. The vast majority of candidates were able to produce a response which covered some of the relevant points but disappointingly the level of detail was often unsatisfactory.

Application of the facts to the law was largely better than explanation and analysis of the law itself. Some candidates correctly referred to the case of *Yeung May-Wan & Others v HKSAR* (2005), in which the CFA elaborated upon the standard of reasonable suspicion that the officer, at the time of arrest, must have. However, few provided sufficient detail to evidence their understanding of that decision. Notably, a limited number demonstrated knowledge that suspicion is not the same as proof, and officers can take into account matters that could not be put in evidence at court (relevant here what with the lack of a police caution). The CFA added that information, upon which arrests may be made, may come from a variety of sources such as intelligence/knowledge of area. The focus is on the mind of arresting officer, who must be shown to have a genuine and reasonable suspicion i.e. a genuine suspicion on grounds which an objective observer would regard as reasonable.

Finally, a common mistake in answers was for candidates to apportion too much discussion to stop and search powers under s.54 PFO. No power of arrest is contained here and so mention of such was a distraction.

Question 1.2

This question required students to demonstrate their knowledge of the procedures relevant to an officer giving a caution. This included discussion of the form and language of a caution, and case law supporting these principles (e.g. *Rv Brosch* (1988)*; Alderson v Booth* (1969); *Christie v Leachinshy* (1947) HL). PC34 should inform Janet that she is being arrested for drug trafficking.

Not everyone referred to Article 5(2) of BORO although greater numbers were able to explain the consequences of an arrested person not being informed of the grounds for the arrest. Surprisingly, few students took the opportunity to include the actual words that must be used and therefore failed to attract marks. Equally, the opportunity to explain that PC34 should comply with the 1992 Rules and Directions for the Questioning of Suspects and the Taking of Statements ("the Rules and Directions") was lost on many students. Where reference was made to the Rules and Directions, Rule 2 was infrequently cited.

Question 1.3

1.3 (i)

This question required a concise statement of the purpose of a preliminary enquiry (namely, for a magistrate to determine whether there is sufficient evidence to commit the accused for trial in the CFI). Answers did not always tackle this question in a way that indicated full understanding of this procedure. All too often the test employed was absent in responses and many students failed to identify the correct provision: s85 (2) MO.

1.3 (ii)

This question was dealt with satisfactorily in many instances, but with a majority of students focusing on increased costs. Other less common examples which students could have raised were the fact that a PI commits prosecution witnesses on oath to a particular version of events (as an advantage); or the possible exposure of defence strategy during cross-examination of prosecution witnesses (as a disadvantage).

1.3 (iii)

This question was generally answered correctly. If the accused is discharged, following a PI this is not the same as an acquittal. In the majority of cases, students would have attracted full marks if they referred to the actual wording of s 85(1) MO.

1.3 (iv)

Section 16 of the CPO was the relevant provision for this question. More often than not it was identified. Some scripts revealed a degree of confusion however as to whether a discharge acts as an acquittal (it does). To be awarded full marks, students should have explained that it may be subject to an appeal by the prosecution.

Question 1.4

Responses to this question were lacking, superficial (or missing) at times. Many students failed to mention core aspects of a probation order (for the offender to (1) keep the peace and be of good behaviour and (2) submit to the supervision of the probation officer), or DATCO (treatment in a centre with the object of care and rehabilitation). Of relevance here, in granting a probation order, special conditions may be imposed, such as to submit to periodic drug tests or to submit to psychological counselling.

Remarkably, insufficient numbers of students referred to the Probation of Offenders Ordinance Cap. 298, which governs Probation orders. Where case law was mentioned it often appeared out of place. Crucially, many students failed to correctly explain that probation cannot be imposed together with any other sentence. As such a DATC would *not* be imposed alongside probation.

Part B

Question 2

This question was a straight forward one requiring candidates to demonstrate knowledge of the bail provisions and apply them (sensitively) to the facts of the scenario provided.

While students were often able to mention some of the correct bail provisions, there were few very good answers. A reason for marks being deducted was an inability to express clearly the purpose of key provisions (e.g. sections 9D(2), 9D(3) and 9G of the CPO). Although some good attempt at handling the facts was evident, the key failure in answering this question therefore related to structuring the legal provisions in a coherent way.

Question 3

Although this question required some thought from students, a solid grasp of the disclosure regime would have enabled them to answer it comprehensively. Answers to this question were generally disappointing. A large number of candidates referred, incorrectly, to the requirements of written statements pursuant to s.65B CPO.

The prosecution has a duty at common law to disclose its case to the defence. In this regard, it was expected that students made appropriate reference to Article 87 of the Basic Law and Article 11(2) BORO. The principles of disclosure and relevant cases (e.g. *Lee Ming Tee (No2) v HKSAR* (2004) CFA) are stated in the Prosecution Code, (paragraph 12). Occasionally students referred to an out of date prosecution policy. In the case of *Lee Ming Tee (No2)*, the duty was described as a requirement to disclose all relevant material which may undermine the prosecution case or advance the defence case. This is not restricted to the evidence the prosecution intends to rely on at trial.

Question 4

All that was required here was for students to correctly identify that the defence may make a submission of "no case to answer" at the close of the prosecution's case.

The submission is that no jury property directed on the evidence could convict the accused. To their detriment, students did not always understand that it is a submission of law not of fact. While many responses identified that the leading case is that of *R v Galbraith* (1981) CA, which is good authority in Hong Kong (*AG v Li Fook Shiu, Ronald* (1990) HKCA), they repeatedly failed to articulate the test in full by explaining both limbs in an intelligible way. In either situation, the judge should stop the case and acquit the defendant. If the case is heard in the CFI, the submission and any reply would be heard in the absence of the jury. If the judge decides to uphold the defence submission and rule there is no case to answer, the judge will bring back the jury and direct them to acquit the defendant. Regrettably, there were instances of students ignoring discussion of the second limb and relevant case law pertinent to it (e.g. *R v Shippey* (1988)).

Final comments

On its face, this was not a particularly complicated examination. Nonetheless the overall level of answers received indicated that students were often unable to identify the correct area of criminal procedure that applied. The topics covered in this exam were all fundamental aspects of the subject and should not have taken any student, who had spent time learning the syllabus, by surprise.

NB: *candidates who simply regurgitate text verbatim from prescribed texts are not simply at risk of being awarded few/no marks, but are also at risk of plagiarism.*